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Attorneys for Defendants
C. R. Bard, Inc. and
Bard Peripheral Vascular, Inc.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

IN RE: Bard IVC Filters Products Liability
Litigation,

This Document Relates to:

Lisa Hyde, et al. v. C. R. Bard, Inc., et al.
CV-16-00893-PHX-DGC

No. 2:15-MD-02641-DGC

**DEFENDANTS' MOTION IN
LIMINE NO. 3 TO EXCLUDE
EVIDENCE OF THE SIMON
NITINOL FILTER AS A
REASONABLE ALTERNATIVE
DESIGN**

(Assigned to the Honorable David G.
Campbell)

1 Bard moves in *limine* to exclude any reference, evidence, or argument that the
 2 Simon Nitinol filter is a reasonable alternative design for purposes of Plaintiff's burden
 3 under Wis. Stat. 895.047(1)(a) (the "strict liability statute").

4 **ARGUMENT AND CITATION OF AUTHORITY**

5 Under Wis. Stat. 895.047(1)(a) to establish a design defect, proof of a reasonable
 6 alternative design is mandatory. *In re: Zimmer Nexgen Knee Implant Products Liability*
 7 *Litigation*, 218 F. Supp. 3d 700, 723 (N.D.IL. 2016). In their response to Bard's motion
 8 for summary judgment, Plaintiffs made the contention that the Simon Nitinol filter is a
 9 reasonable alternative design for the filter implanted in Ms. Hyde. Bard anticipates that
 10 Plaintiff will attempt to introduce evidence of the Simon Nitinol Filter as a safer
 11 alternative design at trial. The Simon Nitinol filter is a permanent filter only and, unlike
 12 the G2®X or the Eclipse,¹ is not a retrievable filter that may remain in a patient
 13 permanently at the discretion of a physician. The undisputed evidence in this case is that
 14 the implanting physician who implanted Mrs. Hyde's filter chose it because it could be
 15 retrieved. Henry deposition 89:25 – 90:12 (Attached as Exhibit A). Dr. Henry also
 16 acknowledged in response to questions from Plaintiffs' counsel, that there is a "permanent
 17 filter market," and a "retrievable filter market." Henry 19:6-24 (Exhibit A). Additionally,
 18 Dr. McMeeking, Plaintiff's only expert on filter design, testified that the Simon Nitinol
 19 filter is "not meant to be used in situations where retrieveability is – is advised by the
 20 doctor." McMeeking deposition 222:15-17 (Attached as Exhibit B). Dr. McMeeking
 21 further testified that he is not offering an opinion about the Simon Nitinol as a safer
 22 alternative design for a retrievable filter. McMeeking 222:1-6 (Exhibit B).

23 As a result, any evidence or testimony about the Simon Nitinol filter as a reasonable
 24 alternative design to the retrievable filter at issue should be excluded.

25 Under Wisconsin law, a product is not evidence of a reasonable alternative design
 26

27 ¹ For purposes of this motion the analysis is the same whether the filter at issue is a G2X
 28 or an Eclipse as both are retrievable filters.

1 if it makes the product “something else.” *See Godoy ex rel. Gramling v. E.I. du Pont de*
 2 *Nemours & Co.*, 743 N.W.2d 159, 162 (2007) (noting that an alternative design cannot
 3 make the product “something else”), *aff’d as modified*, 768 N.W.2d 674 (2009)
 4 Dr. McMeeking admits that the Simon Nitinol is a different filter than the filter at issue in
 5 this case and it is “not meant to be used in situations where retrieveability is – is advised.”
 6 A different product is not a safer alternative design. *See, e.g., Burks v. Abbott Labs*,
 7 No. 08-3414 (JRT/JSM), 2010 WL 1576779, at *4 (D. Minn. Apr. 20, 2010) (rejecting
 8 liquid infant formula as an alternative design to a powdered infant formula); *Hosford v.*
 9 *BRK Brands, Inc.*, 223 So.3d 199, 207 (Ala. 2016) (affirming judgment as a matter of law
 10 that “dual-sensor smoke alarms” are not reasonable alternative designs to “ionization
 11 smoke alarms”); *Caterpillar v. Shears*, 911 S.W.2d 379, 384-85 (Tex. 1995) (“A
 12 convertible can be made safer by fully enclosing the cab, but then it is just an ordinary
 13 car. . . . It is not rational, however, to impose liability in such a way as to eliminate whole
 14 categories of useful products from the market.”); *Niedner v. Ortho-McNeil Pharm., Inc.*,
 15 58 N.E.3d 1080, 1087 (Mass. Ct. App. 2016) (rejecting that oral contraceptives are a
 16 feasible alternative design to a patch contraceptive); *Brockert v. Wyeth Pharms., Inc.*, 287
 17 S.W.3d 760, 770 (Tex. Ct. App. 2009) (“a safer alternative design must be one for the
 18 product at issue”).

CONCLUSION

20 For these reasons, Bard respectfully requests that the Court grant its Motion and
 21 enter an order excluding any argument, evidence, or suggestions to the jury that the Simon
 22 Nitinol filter is a reasonable alternative design to the retrievable filter at issue.

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1 RESPECTFULLY SUBMITTED this 10th day of August, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of August, 2018, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to all attorneys of record.

s/Richard B. North, Jr.
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